No. 141837

IN THE

MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

v.

ANGEL MORENO, JR.

Defendant-Appellant

ON APPEAL FROM THE COURT OF APPEALS
(Owens, P.J., O'Connell, and Talbot, JJ)
Court of Appeals No. 294840
Ottawa County Circuit Court No. 2009-033445-FH

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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I. A PERSON WHO IS PRESENT IN HIS OR HER HOME CAN LAWFULLY RESIST A POLICE OFFICER WHO UNLAWFULLY AND FORCIBLY ENTERS THE HOME WITHOUT VIOLATING MCL 750.81d.

In his opening brief, the Appellant argued that there were four reasons to conclude that *People v. Ventura*, 262 Mich App 370, 686 N.W.2d 748 (2004) was wrongly decided: a) the Court of Appeals analysis is directly contrary to *People v. Dupree*, 486 Mich 693, 788 N.W.2d 399 (2910) which held that the failure of the Legislature to specifically address an issue should not be deemed to abrogate long-standing principles of common law. In *Ventura*, the Court of Appeals abrogated a long-standing principle of common law without a specific signal from the Legislature; b) the Legislature had sent a contrary signal because MCL 750.81d(7)(a) defines "obstructing an officer" in terms of resisting a **lawful** command. The Court of Appeals created an inconsistency by its statutory interpretation and that inconsistency cannot be logically explained; c) when the Legislature enacted the Self Defense Act and abrogated long-standing common law principles, it specifically stated that this abrogation was intentional. Had the Legislature intended to abrogate common law principles of self-defense when it enacted MCL 750.81d, it would have said so; and d) the Court of Appeals made a policy decision (reduce danger to the police and the public) that should have been made by the Legislature when *Ventura* abrogated long-standing principles of the common law of self-defense.

The People disagree. (P. Br, pp. 1-5). The Appellant submits that the People's arguments should be rejected. Specifically:

A. The People argue that the Court of Appeals has consistently followed *Ventura*. The Appellant agrees that the Court of Appeals has been steadfast, but this argument does not address the Appellant's position that *Ventura* was wrongly decided and that it should be overruled ;

B. The People cite an unpublished civil case–*Haynes v. Lamontaine*, 2006 Mich App Lexis 502 (2006)--as an example of how the Court of Appeals has interpreted *Ventura*. The People's argument only states the obvious (subsequent panels adhere to *Ventura*) and does not address the question of whether *Ventura* should be overruled; and

C. The People assert that the Appellant "violated the statute when he grabbed Officer Hamburg in an attempt to forcibly eject Officer Hamberg from the porch." (P Br, p. 5). The Appellant submits that this is the wrong focus. Rather, the Appellant had refused consent to search his home and was lawfully closing his front door when Officer Hamberg put his shoulder into the door, forced it open, and initiated what became a violent confrontation. When the Appellant was attempting to close the door, he was inside of his own home and not on the porch.

In sum, the People have ignored all of the affirmative arguments made by the Appellant and have made no effort to inform this Court why *Ventura*'s interpretation of the statute is correct. For the reasons stated in the opening brief, the Appellant is respectfully asking this Court to overrule *Ventura* on the grounds that it was wrongly decided.

II. IF THE COURT OF APPEALS CORRECTLY INTERPRETED THE STATUTE, MCL 750.81d AS SO INTERPRETED IS UNCONSTITUTIONAL (U.S. Const. Am IV and V, 1963 Const. Art 1, Sects. 11 and 17).

The Appellant's opening brief cited numerous cases from the United States Supreme Court, this Court, and Courts from other jurisdictions that have uniformly held that a person's home is a person's castle. For that reason, a person does not have to retreat and a person can defend himself or herself in the home. These decisions are rooted in Constitutional provisions. Based on these cases, the Appellant argued that if *Ventura* was properly interpreted as preventing a person from defending his or her home even in the face of police illegality, the statute must be

unconstitutional. In the instant case, the Appellant was in his home. He refused consent to search and he was immediately subjected to an attack on the part of the police. It is the Appellant's position that the only interpretation of the statute that is consistent with the Constitution is that the Appellant had the right to defend himself.

The People disagree. (P, Br, pp. 6-11). It is the Appellant's position that the People's arguments are without merit. Specifically:

A. The People state that the "police officer noted the smell of burning marijuana coming from inside of the residence." (P, Br, p. 6). This statement is misleading because it does not accurately describe the record. Officer Hamberg testified that he smelled the odor of burning marijuana on direct examination. Appx 18a. However, he also testified that he was unable to see any drugs when he looked inside of the house. Appx 18a. On cross examination, Officer Hamberg admitted that he personally saw no evidence of marijuana after he had entered the house. Appx 24a. Officer DeWewys, who was also present, testified that "I could not smell anything other than an odor of intoxicants–a strong odor. Appx 36a. Given the inconsistent testimony of the two officers and the fact that Officer Hamberg found no corroboration that marijuana was being smoked, the Appellant submits that little if any weight should be given to Officer Hamberg's marijuana testimony. In addition, using small amounts of marijuana is a minor crime that in no way justifies the Constitutionally illegal entry which occurred;

B. On page 7 of its brief, the People state that the Fourth Amendment "protected the police from entering a home without a warrant or consent..." "Protected" is not the right word. Appellant submits that a more accurate word would be "prevented;"

C. The People next offer an example of an act of kidnaping a baby (a very serious felony)

occurring in the presence of the police. (P Br, pp. 7-8). The People argue that "no court...would hold that the Fourth Amendment insulated the individual from prosecution." (P, Br, p. 8). The Appellant submits that this is a true example of an exigent circumstance. However, such an exigent circumstance did not exist in the instant case. Neither of the two officers saw a serious felony being committed in their presence. Neither of the two officers saw a baby in harm's way. At most, the officers were investigating under-aged drinking or misdemeanor marijuana use, both of which are minor offenses and neither of which justified a warrantless entry into the Appellant's home. The People's example does not fit the facts of the Appellant's case;

D. The People state that "at no time did [the Appellant] ever tell the officer that he was acting to prevent an illegal entry." (P Br, p. 8). The Appellant submits that this argument is Constitutionally irrelevant. The Appellant refused consent, and was in the process of closing his front door. The police officer put his shoulder into the door and forcibly entered the Appellant's home. The police officer did not have a warrant. The cases cited in the opening brief make it clear that the Appellant had the right to refuse consent and to close the front door of his home. There is nothing in any of the cases cited in the opening brief that puts a burden on a home owner to tell the police that they are acting illegally. Indeed, it is the police who are the law enforcement officers and they should know the difference between a legal and an illegal act. Interestingly, the People cite no case in support of their assertion;

E. The People further argue that there "is no evidence the actions of defendant occurred because he perceived the actions of the police to be illegal." (P, Br, p. 8). The Appellant submits that this argument is also Constitutionally irrelevant. What the Appellant perceived is that he was in his own home and that he was not giving consent for a search. The Appellant also

perceived that he closed the door to his house because he did not want the police to enter. The question for the Courts is whether the Appellant acted legally. The Appellant submits that his actions were legal because they were within his Constitutional rights and that, as a result, the police's forcible entry into the Appellant's home was both illegal and in violation of those Constitutional rights;

F. The People cite and quote from *Ventura* to argue that the Fourth Amendment is "simply not implicated in the issue of whether MCL 750.81d is constitutional." (P, Br, pp. 8-9). The Appellant replies that *Ventura* was a statutory construction case. It reached no decision regarding the Constitution. The quoted excerpt does not mention the Constitution. Rather, it is evidence that the Court of Appeals was usurping the authority of the Legislature to make policy decisions. As the cases cited by the Appellant in its opening brief make clear, the Michigan and Federal Constitutions clearly give a person's home the highest level of Constitutional protection. The Constitution is definitely implicated. The People's brief does not acknowledge all of these cases and makes an assertion for which there is no legal support;

G. The People argue that the lack of a warrant is not dispositive because there might be an exception such as exigent circumstances. (P, Br, p. 9). However, there were no exigent circumstances in the instant case. *Cf, Welsh v. Wisconsin*, 466 U.S. 740 (1984) (discussed at length on pp 18-19 of the Appellant's opening brief which held that the relatively minor nature of the underlying offense is a factor in deciding whether a circumstance is exigent and thus an exception to the warrant requirement. The underlying offense in *Welsh* was minor because it was a misdemeanor. Thus, a warrantless search based on the grounds that evidence of the defendant's blood alcohol content might dissipate is illegal. 466 U.S. at 754. In the instant case,

the underlying offenses were under-aged drinking and marijuana use. As in *Welsh*, the underlying offenses are minor and don't justify a warrantless entry to preserve evidence;

Contrary to the People's argument, the lack of a warrant is an extremely important fact because there is no exception to the warrant requirement on the facts of the instant case.

H. The People argue that *Ventura* "has been law since 2004 and has been followed by every Court of Appeals decision since being reported." (P, Br, p. 9). At the threshold, *Ventura* is a published case and is therefore binding precedent on other panels of the Court of Appeals. MCR 7.215(C) (2). Thus, it is hardly remarkable that the subsequent panels would follow the Court Rule. By contrast, this Court has the authority to overrule *Ventura* and that is exactly what the Appellant is asking this Court to do.. Remarkably, the People's brief makes no attempt to respond to the Appellant's arguments about overruling *Ventura*. In addition, the People's brief makes no attempt to explain why *Ventura* was rightly decided. For these reasons, the People's arguments have absolutely no merit;

I. The People cite another unpublished case which rejected a constitutional argument. *People v. Brown*, 2008 Mich App Lexis 1162 (2008). However, this case is no different from the instant case where the same decision was made. The Court of Appeals has taken the rigid position that *Ventura* forecloses any resistance to an officer. This position is deemed to trump the Constitutional protections offered by both the Michigan and Federal Constitutions. This position is also contrary to all of the cases cited by the Appellant in his opening brief. *Brown* merely represents adherence to *Ventura*. The People's brief cites the case but makes no attempt to explain why *Brown* or *Ventura* were correctly decided;

J. The People state that "the statute does not violate the Fourth Amendment nor is it

unconstitutionally vague so defendant's argument must fail." (P, Br, p. 11). At the threshold, *Brown* is not binding on this Court so "must fail" is entirely without merit. In addition, *Brown* has no precedential value because it is unpublished. Finally, the People's argument makes no attempt to reconcile *Brown* with all of the contrary authority cited in the Appellant's opening brief (which included this Court's decision reaffirming the castle doctrine–*People v. Riddle*, 467 Mich 116, 649 N.W.2d 20 (2002)–a decision upon which the Appellant relies).

III. A DEFENDANT PROSECUTED UNDER MCL 750.81d FOR RESISTING A POLICE OFFICER WHO UNLAWFULLY AND FORCIBLY ENTERS THE DEFENDANT'S HOME MAY CLAIM SELF-DEFENSE.

As this Court recently held in *People v. Dupree*, 486 Mich 693, 788 N.W.2d 399 (2010), the right of self defense is firmly rooted in the common law. For that reason, the Legislature must send a clear indication that the Legislature intended to abrogate common law before such a defense becomes unavailable to a criminal defendant. The Appellant's opening brief argued that since there is nothing in MCL 750.81d which indicates that the Legislature intended to abrogate the common law of self-defense, the Appellant was entitled to assert such a defense.

Alternatively, the Appellant argued that he was protected by the provisions of the Self-Defense Act ("SDA") MLC 780.971 through 780.974. MCL 780.973 and 780.974 are explicit statements of the Legislature's intent to modify the common law. This statute speaks specifically in terms of the "imminent **unlawful use of force** by another individual." Thus, the reasoning found in *Ventura* and its progeny do not apply to someone within the protections of the SDA. The SDA converted Michigan into a "stand your ground" state and makes it clear that as long as a person qualifies under the statute (as Appellant does), he can repel unlawful force and he has no duty to retreat. The SDA was enacted after *Ventura* so that it is clear that, at the very least,

the Legislature rejected the notion that *Ventura* is relevant to cases such as the instant case..

The People disagree. (P, Br, pp. 12-14). The Appellant submits that the People's arguments have no merit and that they should be rejected. Specifically:

A. The People argue that "there was never any risk of serious bodily harm or death to oneself or another." (P, Br, p. 12). The People further argue that the police's intent was to secure the residence which the People describe as "an inanimate object." (P, Br, p. 12).

The record refutes the People's first argument. Specifically, the Appellant refused consent and was closing the door to his home. Appx 20a. There were five police officers at the scene. Appx 15a.. Four were in full uniform with weapons in plain view. Appx 16a. Officer Hamberg's response was to put his shoulder into the door and to forcibly enter the Appellant's home. Appx. 20a. The Appellant attempted to protect his home. Appx 20a. A violent confrontation ensued which confrontation was initiated when Officer Hamberg forcibly entered the Appellant's home. Appx. 20a-21a. The record is clear that if Officer Hamberg had simply respected the Appellant's decisions to refuse consent and to close the door of his home, no confrontation between the Appellant and the police would have occurred. Appx. 20a-22a.

The Appellant thus submits that there was a great risk of bodily harm and that the People's argument to the contrary simply has no factual merit.

As to the People's second argument, the issue is not whether the police's intent was to secure the residence. Rather, the issue is the methods by which they sought to attain their goals. Those illegal methods involved home invasion and the initiation of a violent confrontation;

B. The People next argue that finding that the Appellant had a right to defend his home "defeats the purpose of the statute and legislative intent." (P, Br, at p. 13). The People do not

explain how this supposedly occurs. The cases cited by the Appellant in his opening brief, and the castle doctrine stand for the proposition that a person's home is his or her castle, that there is no duty to retreat, and that a person can stand his or her ground in defense of his castle. The People cite no cases in support of their bold assertion. The People fail to explain why the SDA does not trump MCL 750.81d on the facts of this case. For these reasons, the People's arguments are completely without merit.

C. The People cite *People v. Cash*, 419 Mich 230, 351 N.W.2d 822 (1984). But *Cash* only addressed the question of whether an honest mistake about age is a defense to a statutory rape allegation. *Cash* has no applicability to the instant case. Interestingly, the People never cite this Court's decision in *Dupree* (in this section of their brief) or explain why that case is not controlling. *Dupree* also refutes the citation to *Ventura* because the Legislature gave no indication that MCL 750.81d was intended to overrule decades of the common law.

D. The People argue that the Appellant could have been arrested for knowingly allowing minors to consume intoxicants and that this fact means that self-defense could not be asserted. (P, Br, pp. 13-14). At the threshold, the police had no proof that minors were the ones consuming liquor. Officer Hamberg saw liquor bottles, but he did not see any minor consuming liquor. Appx 15a. The police did not know who the Appellant was and had no evidence that he was personally involved in any criminal activity. Appx 20a-21a. Finally, as cases such as *Payton v. New York*, 445 U.S. 573 (1980) make clear, suspicion of criminal activity is not a reason to enter a person's home without a warrant.

IV. EXIGENT CIRCUMSTANCES WERE PRESENT

This issue was suggested by a single Justice who is no longer on the Court. The majority

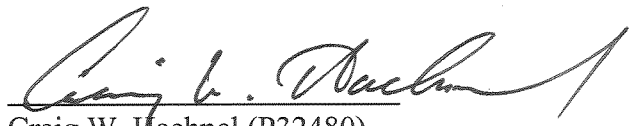
did not ask that this issue be addressed, and the Appellant did not separately address it in his opening brief. The Appellant submits that this issue is not fairly before this Court. However, the Appellant will briefly respond. The People identify "imminent destruction of evidence" as an exigent circumstance and as a reason for the warrantless entry into the residence. (P, Br., p. 17). This very argument was squarely addressed and rejected by the United States Supreme Court in *Welsh v. Wisconsin*, 466 U.S. 740 (1984).Specifically the Court held that if the underlying offense is a minor one, e.g. a misdemeanor, dissipation of evidence is not a reason that justifies a warrantless entry into a person's home. In the instant case, the possible offenses being investigated were under-aged drinking and use of marijuana. These are both minor offenses and, as a result, as in *Welsh*, the desire to prevent the destruction of evidence is not an exigent circumstance. Interestingly, even though the Appellant's opening brief cited and discussed *Welsh* at length (App. Open. Br at pp. 18-19), the People totally ignore the case and make no effort to distinguish it. The Appellant respectfully suggests that *Welsh* cannot be distinguished and that is why it was ignored. The Court's attention is respectfully directed to pages 18-21 of the Appellant's opening brief which contain an extended discussion of the issue. For the reasons stated, there were simply no exigent circumstances and no justification for a warrantless entry.

Conclusion

For all of the reasons stated in the opening brief and this brief, the Appellant is respectfully asking this Court to overrule *Ventura*, to find that the interpretation given to MCL750.81d by *Ventura* renders the statute unconstitutional, and that self defense is available under either the common law or the SDA.

Respectfully submitted,

Grand Rapids, MI
April 19, 2011



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